



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A)

CRIMINAL APPEAL NO. 337 OF 2010

BETWEEN

BENJAMIN MBITHI KAVEVA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Azangalala & Odero, JJ.) dated 20th May, 2010

in

H.C.Cr.A. No. 307 of 2006)

JUDGMENT OF THE COURT

[1] The appellant, **Benjamin Mbithi Kaveva**, was charged jointly with three other persons before the Senior Resident Magistrate's Court in Kwale. The appellant and his colleagues were charged with several counts including one of robbery with violence contrary to **section 296** of the Penal Code; being in possession of police uniforms without authority contrary to **section 184(3)** of the Penal Code; handling suspected stolen property contrary to **section 322(2)** of the Penal Code; being in possession of a firearm without a firearms certificate contrary to **section 4(1)** as read with **section 4(2)(b)** of the Firearms Act; and being in possession of ammunitions without a firearms certificate contrary to **section 4(1)** as read with **section 4(2)(b)** of the Firearms Act .

[2] Hearing of the case proceeded before the Senior Resident Magistrate who upon hearing the testimony of eleven prosecution witnesses ruled that the appellant had a case to answer and put him on his defense. However, when the matter came up for defense hearing, the appellant declined to give any kind of statement and/ or call witnesses alleging that he had been denied an opportunity to cross examine two of the prosecution witnesses. In his judgment, the trial magistrate convicted the appellant of the offence of robbery with violence, but acquitted him of all other counts. The trial magistrate sentenced the appellant to suffer death as is by law provided for the offence of robbery with violence.

[3] Being dissatisfied with this outcome, the appellant lodged an appeal in the High Court challenging both his conviction and sentence. The appeal was premised on two broad grounds: firstly that in convicting the appellant, the trial magistrate erroneously relied on uncorroborated identification evidence, and secondly, that the trial magistrate denied the appellant an opportunity to be heard. The appeal was heard by **Azangalala & Odero JJ.** who by a judgment delivered on 11th May, 2010 dismissed the appeal. The appellant has now preferred a further appeal to this court.

[4] The particulars of the charge of which the appellant was convicted were as follows:

On the 18th day of August, 2005 at Maweni village in Kwale district within coast province, jointly with others not before court, while armed with dangerous weapons namely AK 47 rifle and pistols, (sic) robbed Samuel Mubea Waweru cash Kshs 52,000/-, one sony DVD video player, one celtel payphone serial number 0412220808, one mobile charter (sic), one handbag all valued at Kshs 84,000/- and at immediately (sic) after the time of such robbery threatened to shoot the said Samuel Mubea Waweru.

[5] From the record of appeal, the circumstances leading to the appellant's arrest were as follows: The complainant, **Samuel Mubea Waweru** (PW2) was a shopkeeper then operating a shop at Maweni village. On the material date, at around 7.00pm he was attending to customers when a person came to his shop window and at gunpoint, ordered the customers to lie down. The man ordered the complainant to open the

door to the shop, whereupon about six people entered the shop and demanded money from the complainant at gunpoint. He gave them Kshs.15,000/- and they also took his mobile phone and the charger. He was then ordered to lie down alongside his customers.

[6] The robbers thereafter proceeded to raid the complainant's house which was located at the back of the shop. They found the complainant's wife, **Emily Njeri Chege** (PW3) who was forced at gun point to show the robbers where the money was kept. The robbers took Kshs.25,000/- which was under the bed, as well as a black bag and a Sony DVD video player.

[7] Having accomplished their mission, the robbers took off, whilst firing in the air. This attracted the attention of police officers on patrol in the area including No. 39591, **Corporal Thomas Wafula** (PW4), who rushed to the scene and found the complainant and his customers still lying on the ground. In a bid to get the robbers to surrender, the police fired shots in the air. The gangsters refused to heed this warning and continued running while shooting at the police who returned the fire. The exchange of fire resulted in the shooting of one of the suspects. This resulted in a trail of blood, which led the police to the perimeter fence. They found the appellant who was bleeding profusely from a gunshot wound to the leg, lying on the outer side of the fence.

[8]The police also managed to recover one AK47 rifle, a pistol, a mobile phone, a DVD player and a black bag near the complainant's shop. Upon his arrest the appellant led the police to arrest of his co accused persons. The appellant was then taken to Msambweni Hospital, where he was admitted and treated before being arraigned in court about two weeks later. It was on the above evidence, that the appellant having opted to say nothing in his defence was convicted by the trial magistrate.

[9] The appeal was scheduled for hearing on six different occasions, but was adjourned at the instance of the appellant. On 22nd September, 2014, the appellant sought yet a further adjournment, on account of an application ostensibly filed in the High Court. At this juncture, the appellant was acting in person having rejected all his state appointed counsel. Upon a careful perusal of a copy of the said application, this court found that the application had no nexus with this appeal as it concerned alleged violation of the appellant's constitutional rights, and was filed long after this appeal had been filed. The Court therefore declined to adjourn the hearing of the appeal. Having failed to have his way, the appellant opted not to address the court in regard to the appeal and instead expressed his wish to remain silent. Consequently, the court had only the memorandum of appeal and the submissions of the learned state Counsel, **Mr. Yamina** (*for the Respondent*) to determine the appeal.

[10] The specific grounds upon which the appellant impugned the judgment of the High Court as stated in the memorandum of appeal were as follows:

1. Arbitrary and unconstitutional detention in breach of Article 49F (sic) (1) (1), G, H as read with section 36, 37, of the C.P.C given that:-

(i) Illegal institution of trial proceeding (sic) after the expiry of the mandatory 24 hrs as provided in law turned the recorded

proceedings illegal and inadmissible (sic)

(ii) The illegality can only be legalized after the prosecution explains the delayment (sic)

2. Arbitrary and unlawful punishment in breach of section 134, 137 A (1) (11), 214 89(5), 275(2), 276(2) of the C.P.C

(i) The charge is defective; section 295 provides the offence whereas section 296(2) provides the penalty

(ii) The drafter failed to indicate section 295 of the C.P.C.

3. Arbitrary and unlawful punishment in breach of section 63 (3) 107 (1) (2) 109 of the Evidence Act:-

(i) The evidentiary burden of proof to the said blood was not brought in clear measures (sic). This was contravention of section 36 (1) of the sexual offences Act. The blood trail was the link of arrest contrary to the evidence of PW1.

4. Arbitrary and unlawful punishment in breach of Article 50 (2) C,E,P,K same to 51(3) A54 (1) A of the Constitution given that:-

(i) The adjournment I made (sic) was reasonable as I asked for treatment. Yet the trial magistrate denied this right that amounted to it (sic) not cross examining some witnesses and even denial of giving my defense evidence.

(ii) The Appellate Judges dismissing my second ground in my

appeal was a total failure to justice (sic) as they did not put into count (sic) the reason why I was not subject to defense (sic).

[11] In opposition to the appeal, Mr. Yamina submitted that the issue of the alleged arbitrary and unconstitutional detention was considered and determined by the High Court, and is thus not open for deliberation before this court; that the purported infringement of rights occurred prior to the promulgation of the new Constitution and that Constitution cannot be applied retroactively; that under the retired Constitution, the maximum period for detention before trial was set at 14 days, and that in this case, the appellant's pre trial detention of 16 days was necessitated by his hospitalization for the gunshot wound, which explanation had been given to the trial court. Reliance was placed on the decision in **Julius Kamau Mbugua v. R. [2010] eKLR**. Regarding the allegation of defective charge sheet, Mr. Yamina paid homage to the

authority in Joseph Njuguna Mwaura & 2 others v. R. [2013] eKLR contending that **section 296(2)** of the Penal Code is the proper provision when preferring a charge of robbery with violence. In conclusion, Mr. Yamina stated that the right to be heard had been duly accorded to the appellant, but the appellant had waived it prompting the trial court to proceed without his input.

[12] From the grounds of appeal aforesaid, the appellant appears to be challenging two main things: the legality of the sentence and the legality of the trial. This being a second appeal, it is instructive to note that the jurisdiction of this Court is limited to matters of law only. With regard to the legality of the trial, the appellant's bone of contention is that the trial was unlawful for having commenced after the maximum detention period set by law. According to the first ground of appeal, the appellant is of the view that under the retired Constitution, an accused person should not be detained for more than 24 hours without trial; and that doing so would render such proceedings a nullity. This is a misconception of the law.

[13] **Section 72(3)(b)** of the *retired Constitution* provided for the protection of the right to personal liberty in the following terms:

A person who is arrested or detained—

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with. (emphasis mine)

[14] Therefore, although that provision required that an arrested person be brought before court within 24 hours of his arrest, failure to which he should be released, there was an exception where the detainee was suspected to have committed a capital offence, in which case the detaining authority was allowed a maximum of 14 days within which to charge the suspect and if there was delay, provided the reason for the delay could be accounted for to the satisfaction of the trial court.

[15] We are aware that there have been conflicting decisions regarding the consequences of pretrial detention beyond the allowed period. For instance, in Albanus Mwasia Mutua v Republic [2006] eKLR and Gerald Macharia Githuku v Republic [2007] eKLR the convictions of the appellants were quashed on account of the unlawful pretrial detention of the appellants. And in Samuel Ndungu Kamau & Anor v Republic High Court Criminal Appeal No. 223 of 2006 (Nairobi) and Republic v David Geoffrey Gitonga High Court Criminal Case No. 79 of 2006 (Meru) (both decisions unreported) the court rejected attempts to have the criminal trials of the appellants declared a nullity on account of violation of their rights under **section 72(6)** of the retired Constitution. These conflicting decisions and others were exhaustively addressed in Julius Kamau Mbugua v Republic (supra), where the court took the following position:

“lastly had we found that the extra judicial detention was unlawful, and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate, and draconian remedy seeing that the public security would be compromised . If by the time an accused makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then, the only appropriate remedy under section 84(1) would be an order for compensation for such breach. The rationale for prescribing monetary compensation in section 72(6) was that the person having already been unlawfully arrested or detained such an unlawful arrest or detention cannot be undone and the breach can only be vindicated by damages”.

[16] In the present case, the appellant who was charged with a capital offence of robbery with violence was arraigned in court on the 16th day after his arrest. Therefore, he was held in detention two days in excess of the maximum 14 days then allowed by the Constitution. Both **Corporal Thomas Wafula (PW4)** and **Sgt Peter Omusa Isaboke (PW5)** stated that upon arrest, the appellant was taken to hospital and was admitted. PW5 further confirmed that the appellant was discharged from hospital on 10th September, 2005.

[17] In its judgment, the first appellate court addressed this issue when it rendered itself thus;

We appreciate that under section 72(3) of the Constitution, the police were entitled to hold the appellant in custody for fourteen days as he was charged with robbery with violence which carries the death penalty upon conviction. Prima facie, the appellant may have been held in custody for sometime (sic) period beyond the permitted period of fourteen days. The prosecution may not have offered any explanation before the trial magistrate when the appellant was arraigned before him. The record of the trial magistrate however discloses that the appellant was shot in the leg and on being arrested, was admitted to hospital. The appellant in fact acknowledges that he was shot before his arrest... We also observed that the appellant was still in crutches even when he appeared before us in this appeal. Being admitted for treatment is an acceptable explanation for delay in arraigning a suspect before court...

[18] We concur with the learned Judges of the first appellate court that the delay in producing the appellant in court was explainable and that no prejudice was suffered by the appellant due to the delay. Moreover, even assuming that the delay was unexplainable, the conviction cannot be upset solely on account of violation of the appellant's constitutional right as such violation would only give rise to an independent cause of action for damages and not absolve the appellant of any criminal liability in regard to the case then under investigations.

[19] Further, the appellant alleged that his right to a fair trial under **Articles 50(2)(c)(e)(p)&(k)** of the Constitution were violated as he was neither given a right to be heard, nor an opportunity to cross-examine some of the prosecution witnesses, or opportunity to give evidence in his defence. There is no doubt that under the afore cited provisions of the Constitution, an accused is entitled to adequate facilities to prepare for his defence; to a free and fair trial without unreasonable delay; and to an opportunity to adduce and challenge evidence.

[20] According to the court record, the appellant's case came up for hearing before the trial court on diverse dates, when four prosecution witnesses were heard. The appellant only cross examined two of the witnesses and appears not to have had any interest in cross examining the others. On 6th July, 2006, when the matter came up for further hearing, the appellant applied to have the trial magistrate recuse himself from hearing the case. This application was rejected by the trial magistrate whereupon the appellant walked out of the court and went back to the cells in protest. Needless to state that the court proceeded to hear PW5, in the appellant's absence and the appellant therefore never heard the witness's evidence nor cross examined the witness. When the case next came up for further hearing, the appellant communicated his wish to be readmitted back into the proceedings, which wish the trial court acceded to and the appellant participated in the rest of the trial.

[21] From the above, it is evident that the appellant willfully excluded himself from the trial and he cannot claim to have been denied his right to a fair trial. Indeed, **Section 77(2)(f)** of the retired Constitution provided for such a situation. That section stated as follows;

and except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence. (emphasis added)

[22] The position in this case is similar to that in ***Aggrey Mbai Injaga v Republic [2014] eKLR*** where an appellant who had decided not to participate further in the trial proceedings and walked back to the cells, lodged an appeal alleging infringement of his right to be heard. This Court (*differently constituted*) dismissed the appeal noting that the appellant had left the trial court of his own accord and thereby made it impracticable for the hearing of the case to proceed in his presence. Indeed by walking out on the court, he had consented to the trial proceeding in his absence. We would similarly, reject that ground of appeal. In the same vein, it was well within the appellant's rights to decline to say anything in his defense which right the appellant exercised. He cannot therefore claim to have been denied an opportunity to defend himself.

[23] Another ground of appeal urged by the appellant was that the prosecution failed to discharge the burden of proof as required under **section 107 and 109** of the Evidence Act. In this regard, the evidence on record shows that the complainant (PW2) was the first witness to identify the appellant at the scene of crime. His testimony was that following a shootout between the thugs and the police, one suspect was shot, a fact evidenced by the trail of blood which was at the scene. Both PW2 and the police followed this trail of blood and came to a fence where they found the appellant and also recovered some of the stolen goods. The testimony of the complainant was corroborated by PW3 and PW5 who were also at the scene of crime. The evidence adduced against the appellant overwhelmingly supported the charge.

[24] The law pertaining to the framing of a charge of robbery with violence is now well settled following ***Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR***, where this Court in a five Judge Bench decision considered similar arguments as was raised by the appellant in regard to the propriety of the charge of robbery with violence. While reiterating that **section 295** of the Penal Code is merely a definition section and that **section 296(1) & (2)** of the Penal Code deals with specific degrees of the offences, the court stated as follows:

"... Indeed, as pointed out in Joseph Onyango Owuor & Cliff Ochieng Oduol v R [2010] eKLR, the standard form of a charge contained in the second schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law and that is section 296. We reiterate what has been stated by this court in various cases before us: The offence of robbery with violence ought to be charged under section 296(2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others, or he uses any personal violence to any person.

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that any person who steals anything and at or immediately before or immediately at the time of stealing it uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge."

[25] On the above reasoning, we find that the offence of robbery with violence contrary to **section 296(2)** of the Penal Code of which the appellant was charged (and which we set out at the beginning of this judgment) was proper. We therefore dismiss the appellant's contention that the charge was defective.

[26] On the issue of validity of sentence under **section 361(1)(a) & (b)** of the Criminal Procedure Code and although this court is precluded from hearing a second appeal challenging the severity of sentence, this court has jurisdiction to entertain such an appeal on the legality of the sentence. (see ***Joseph Kiplimo v. Republic [2011] eKLR***). In this case, the appellant was sentenced to death which is the mandatory sentence provided under **section 296(2)** of the Penal Code. We repeat what was stated in ***Joseph Njuguna Mwaura & 2 Others v Republic (supra)*** that the death penalty was endorsed by the people of Kenya through a referendum and that it continues to exist in our statute books with constitutional underpinning. The sentence is therefore a legal sentence and therefore nothing turns on that ground.

[27] The upshot of the above is that we must bring this long protracted trial and the resultant appeals to an end. We uphold the appellant's conviction and sentence and dismiss the appeal in its entirety.

Dated and delivered at Mombasa this 14th day of November, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR